

DEMAND MANAGEMENT COMMON INTEREST – CONFIDENTIALITY AGREEMENT

This Common Interest and Confidentiality Agreement (“Agreement”) is entered into on this _____ day of _____, 2019 by and between the Director of the Colorado Water Conservation Board (CWCB) and _____, (Participant) in his/her capacity as a participant in the _____ work group to help frame investigate specific issues or topics consistent with the CWCB’s 2019 Demand Management Workplan. The _____ work group is one of eight groups currently convened to help inform the CWCB’s identification and analysis of various issues relating to the feasibility of a potential Colorado River demand management program within Colorado. The Director and Participant are referred to in this Agreement together as “Parties” and individually as “Party.”

WHEREAS, the state of Colorado is a party to the Colorado River Drought Contingency Plan, which is comprised of a series of agreements among parties in the Upper and Lower Colorado River Basins and the Secretary of the Interior to help protect critical elevations at Lake Mead and Lake Powell and minimize disruption of existing water uses within the Colorado River Basin as it continues to experience protracted dry hydrologic conditions since 2000;

WHEREAS, an element of the Upper Basin Drought Contingency Plan is the Demand Management Storage Agreement, which makes unfilled storage capacity at the CRSPA Initial Units available for Upper Basin use if the Upper Colorado River Commission (UCRC) approves a Demand Management Program to store conserved water for the purpose of helping maintain compliance with the Colorado River Compact. The Demand Management Agreement does not establish an Upper Basin demand management program, but does provide a framework for the Upper Division States and the UCRC to be able to investigate the feasibility of a potential demand management program in the Upper Basin.

WHEREAS, the CWCB is the agency authorized to consider and establish the state’s water policy, it has a responsibility to evaluate and implement mechanisms for the effective management and wise administration of the Colorado River within Colorado. Specifically, it is the express responsibility and within the purview of the Board to, among other things: (a) devise and formulate methods, means, and plans for bringing about the greater utilization of the waters of the state (C.R.S. 37-60-106(1)(c) (2017)); (b) gather data and information looking toward greater utilization of the waters of the state (C.R.S. 37-60-106(1)(d)); (c) cooperate with the other states and Federal Government for the purpose of bringing about the greater utilization of the waters of the state of Colorado (C.R.S. 37-60-106(1)(e)); (d) formulate and prepare drafts of state and federal legislation designed to assist in securing greater beneficial use and utilization of the water of the state and protection from flood damages (C.R.S. 37-60-106(1)(g)); (e) investigate and assist in formulating a response to the plans, purposes, procedures, requirements, law, proposed laws, or other activities of the federal government and other states which affect or might affect the use or development of water resources of this state (C.R.S. 37-60-106(1)(h)); and foster the conservation of the water of the state by the promotion and implementation of sound measures to enhance water use efficiency in order to serve all the water needs of the state and to assure the availability of

adequate supplies for future uses, and that necessary water services are provided at a reasonable cost. (C.R.S. 37-60-106(i)(r)).

WHEREAS, the Board of Directors to the CWCB issued a Support and Policy Statement outlining the sideboards for how investigating demand management feasibility within Colorado will proceed, and subsequently approved the 2019 Demand Management Workplan to commence such investigations;

WHEREAS the 2019 Demand Management Workplan provides for the creation and implementation of specific work groups to help identify and evaluate the legal, technical and policy considerations associated with informing the feasibility of implementing demand management activities in Colorado;

WHEREAS, the Participant has been selected in his or her individual capacity to participate in a demand management work group based on his or her experience and expertise regarding the relevant subject matter, and a demonstrated willingness to apply the necessary skills to help frame statewide demand management considerations within Colorado; and

WHEREAS, the work groups pursuant to the 2019 Workplan are intended to assist CWCB staff facilitate demand management feasibility investigation in Colorado, help frame key issues for the staff's public outreach efforts, and help inform the staff's efforts to advise and make recommendations to the Board of Directors to the CWCB regarding demand management matters. Neither the Parties nor other participants to any demand management work group that is the subject of this Agreement will be authorized with the actual decision-making authority regarding whether and how to implement demand management within Colorado.

THEREFORE, in consideration of the foregoing, and of the mutual promises set forth herein, the Parties agree as follows:

1. Sharing common interests in the Colorado River resource within Colorado, the Parties believe that it is in their mutual best interest to cooperate with each other and to share with each other and other demand management work group participants certain information that may be protected by one or more privileges, doctrines, or immunities, including without limitation, the deliberative process privilege, the work-product doctrine, the common interest privilege, and the joint defense privilege, as well as any additional applicable exemptions under state and federal law (collectively, the "privileges"). To further these common interests, the Parties intend to share and exchange certain information and documents that may be privileged in connection with analyzing approaches and considerations for informing the feasibility of a demand management program within Colorado, possibly including, but not limited to: a) discussions and conversations among or shared between the Parties and other work group participants which are made at meetings, on telephone calls, or other forms of conversations; b) written or electronic communications between the Parties and/or with other work group participants regarding any element of a potential demand management program or

demand management water within Colorado and the Upper Colorado River Basin; c) technical analyses, modeling scenarios, mental impressions, legal memoranda, draft communications, and other information, whether oral, written or electronic in format (collectively, “Shared Privileged Information”). The Parties would not likely openly discuss or share with each other or other work group participants such Shared Privileged Information but for their common or mutual interests to help frame and inform the feasibility of a demand management program within Colorado and but for the protections of this Agreement.

2. Except as provided for in this Agreement and by law, all Shared Privileged Information shall be kept confidential between the Director, her counsel, agents, retained consultants, employees, officers or directors, and the work group participants. Any Shared Information distributed to other demand management work group participants will only occur to the extent those participants have executed a Common Interest – Confidentiality Agreement similar to this Agreement and affording the same level of protection as is contained in this Agreement. The Parties shall not disclose any Shared Privileged Information outside the work groups established for demand management feasibility investigations without the written consent of the other Party, and other work group participants who have executed a Common Interest – Confidentiality Agreement similar to this Agreement, except if:
 - a. The Director, her counsel, agents, retained consultants, employees, officers or directors deem it timely, appropriate and necessary to educate and receive feedback from interested stakeholders at public workshops or other forums pursuant to the 2019 Demand Management Workplan, or to inform and advise the CWCB Board of Directors, the Colorado Department of Natural Resources Executive Directory, or the Upper Colorado River Commission as part of the ongoing process for determining the feasibility of a demand management program within Colorado;
 - b. The Participant has a professional or official duty, obligation or requirement to his or her employer or organization to which s/he is actively involved that would otherwise necessitate the Participant to disclose Shared Privileged Information to continue to effectively operate in his or her official capacity while also participating in a demand management work group. In such instances, the Participant shall provide notice to the Director of the potential need for disclosure of the specific information. Upon agreement by the Director, the Participant may disclose the information identified via the notice, to the Participant’s client, board or other entity to which s/he must report so long as such disclosure can remain confidential or otherwise protected by one or more privilege or confidentiality that can be recognized by Colorado law; or
 - c. Required pursuant to an order from a court of competent jurisdiction that compels the disclosure of the information. The Parties agree that if either receives any summons, subpoena, or similar process, or request to produce information or materials or to provide testimony (including, but not limited to, requests made under FOIA or state public records laws, if deemed applicable),

that includes Shared Privileged Information, that Party will immediately notify and consult with the other Party and/or his designees and provide not less than three (3) business days' notice before any disclosure in order to permit the Parties an opportunity to take appropriate steps to protect their interest. If three (3) business days' notice cannot be provided because of the return date of the process, the Party upon whom the demand or request is made agrees to seek to stay the proceedings in order to allow three business days' notice to the other Parties. The Party upon whom the demand or request is made shall not disclose the Shared Privileged Information in response to a discovery request until after the Parties have had the opportunity to oppose the request and the court has resolved any motion to prevent or limit the disclosure of the requested information. In any such situation, the Party upon whom the demand or request is made also agrees to take all appropriate steps to oppose disclosure of the requested Shared Privileged Information.

3. The Parties shall maintain the confidentiality of all Shared Privileged Information under this Agreement with the same degree of care and diligence used with respect to each Party's own professional confidential or privileged information and documentation.
4. Notwithstanding other provisions in this Agreement, the Participant confirms that s/he will NOT disclose any Shared Privileged Information with any counsel, agent or employee for any Party that has a conflict or appears to have a conflict with the interests of the State as determined by the Director.
5. The Parties shall mark, to the extent practicable, all Shared Privileged Information made available to each other with the following designation:
"Privileged/Confidential Information Produced Pursuant to the Demand Management Common Interest/Confidentiality Agreement." The absence of any such designation or similar designation shall not be construed as a waiver of any applicable privileges from discovery or disclosure of such Shared Privileged Information. The Parties shall cooperate in taking any measures necessary to avoid inadvertent disclosure of Shared Privileged Information, whether or not such information is marked with such designation when initially distributed and shall notify the other Party to this agreement promptly if accidental disclosure occurs.
6. The terms of this Agreement shall apply to any Shared Privileged Information previously shared by the Parties. This Agreement is not intended to apply to information, documents, or communications that do not fall under a recognized confidentiality or privilege, including but not limited to, information or materials from public sources or that are deemed to be the basis of a final decision made by a public official. Moreover, this Agreement is not intended to apply to information, documents, or communications that are derived solely from a Party's own records, witnesses, or work product, that have not been shared with the other Party or other work group participants who have executed an agreement similar to this Agreement. Nothing in this Agreement is intended to preclude a Party from

disclosing to third parties any information or materials from public sources or derived solely from that Party's own witnesses, records, or work product.

7. The Parties recognize it is possible that each Party may take positions that are inconsistent or adverse to one another in administrative proceedings, litigation, or in other legal proceedings. If the Parties advance either inconsistent or adverse legal positions, they will nonetheless be bound by the terms of this Agreement to the extent provided by law. A Party cannot use materials obtained pursuant to the Agreement in actions against the other Party or other work group participants who have executed an agreement similar to this Agreement, unless such materials are either derived solely from the Party's own witnesses, records or work product or the materials are obtained from sources other than the Parties to this Agreement, sources other than other work group participants who have executed an agreement similar to this Agreement, or from the Parties through normal discovery procedures, whether formal or informal, so that applicable privileges can be asserted.
8. Nothing in this Agreement shall be construed to create an attorney-client relationship. Each Party represents and acknowledges that s/he is represented exclusively by his or her own attorney. This Agreement is not intended to interfere with each attorney's obligation to ethically and zealously advocate for his or her individual client. Each participating attorney is obligated to maintain the confidentiality of information as specified in the Agreement, but each attorney does not act on behalf of anyone other his or her own client.
9. Each Party specifically acknowledges that in his or her official capacity, his or her agents, retained consultants, employees, officers or directors may become a witness, whether voluntarily or otherwise, in connection with or as a result of any legal action related to evaluating the feasibility of demand management in the Colorado River basin. In the event that any such person becomes a witness, nothing in this Agreement shall create a conflict of interest so as to require the disqualification of any attorney from the representation of his or her client based on the existence of this Agreement or any sharing of Privileged Information. By entering into this Agreement, each Party and/or each participating attorney knowingly and intelligently waives any conflict of interest or other objection that might otherwise be available based upon the sharing of information pursuant to this Agreement.
10. This Agreement does not prevent any Party hereto from discussing or negotiating any and all issues with any third party affected by evaluating the feasibility of demand management within Colorado or the Upper Colorado River Basin, provided that the Parties shall not reveal Shared Privileged Information to any third party except as provided pursuant to this Agreement.
11. Each Party agrees to immediately notify in writing the other Party when s/he intends to withdraw from the Agreement. In the event that any Party withdraws

from this Agreement or the Agreement is terminated by one or both Parties, or the Agreement has reached its conclusion, the Participant agrees to return all copies (electronic or otherwise) of any materials deemed Shared and Privileged Information consistent with this Agreement to the CWCB. Should the Participant be the person who produced the subject information, then the Director agrees to have the materials returned to the Participant if asked.

12. The provisions of this Agreement shall apply to and be binding upon each Party, their respective officers, directors, agents, employees, successors and assigns, attorneys, consultants, and other person acting as their representative(s).
13. This Agreement shall be interpreted as if prepared by all Parties equally and shall not be construed against or in favor of any of the Parties.
14. No breach of any provision of this Agreement shall constitute a waiver of this Agreement or its provisions unless said breach is expressly waived by the non-breaching Party in writing. The failure of one Party to require performance on the part of another Party pursuant to this Agreement shall in no way affect the full right to require such performance at any time thereafter. Nor shall the waiver of any provision to this Agreement by any non-breaching Party constitute a waiver of any succeeding breach of the same or any other provisions.
15. This Agreement contains the entire agreement between the Parties relating to this subject matter. The terms of this Agreement are contractual and not mere recitals, regardless of how designated. This Agreement is executed by the undersigned without reliance upon any promise, warranty, or representation by any Party other than those expressly contained herein.
16. This Agreement may not be altered, amended, modified or otherwise changed unless agreed to by the Parties in writing.
17. This Agreement may be executed in counterparts, each of which shall be deemed an original. All executed copies or duplicate originals shall be equally admissible as evidence.
18. This Agreement is effective upon execution by the Parties, and shall be in effect until the Parties either individually decide or jointly agree to terminate this Agreement.

Rebecca Mitchell
Director
Colorado Water Conservation Board